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No. 01-1241

In The

Supreme Court of the United States

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

ELLEN GAYLE MOORE, FANNIE McCONNELL, SPENCER WILLIAMS and ANITA BOWERS, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1988(a) requires federal district courts in Alabama to apply not only that state's residual two-year statute of limitations for personal injuries to federal civil rights claims, but to apply as well Alabama's unique common law rule of repose, a substantive state law doctrine separate from the statute of limitations.

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I. STATEMENT OF THE CASE

1. From at least 1940 to the mid-1970s, petitioner Liberty National Life Insurance Company sold low-value industrial life insurance policies to African-Americans for which the premiums charged were higher and the death and other policy benefits received were lower than for similarly situated Caucasian individuals. R3-55-10-12 ¶¶27-30, 14-15¶42, 18¶51. For more than fifty years to within two years of the filing of the initial complaint, Liberty National continued to collect excessive premiums based upon race from the African-American plaintiffs who brought this action, respondents in this Court, and continued to pay them lower policy benefits than paid to similarly situated Caucasians. R3-55-4¶8, 10-11¶27, 18-19¶¶51-53.

Many class members, including plaintiffs McConnell, Williams and Bowers, are still paying race-based premiums to Liberty National on policies they purchased. R3-55-18-19¶52, 21¶¶64-66, 22-23¶¶68-74.

As the amended complaint explains, "industrial" life or "burial" insurance is life insurance with a low face value, typically less than $20,000, often sold to cover funeral expenses. Liberty National trained its agents to manipulate poor and unsophisticated African-American policyholders to buy such insurance by playing to a sense of shame in leaving loved ones without funds to pay for a funeral upon their death. R3-55-5¶11. Premium payments (typically $1.00 or less per week) were intentionally designed to appear to the prospective policyholder to be modest and were collected at their homes on a weekly, and later, a monthly basis. R3-55-3-5¶¶9-11.

Liberty National's policies were designed to increase company profits by charging exorbitant premiums compared to the benefits provided. At the same time, the company assumed little or no risk, given the minimal benefits offered. R3-55-5-6¶¶12-14. As a result, the company has received and plaintiffs have paid millions of dollars in excessive, racially discriminatory premiums that have not been returned. R3-55-8-9¶¶18-23.

The amended complaint alleges in detail that Liberty National fraudulently concealed plaintiffs' claims, delaying their accrual. Liberty National actively concealed the discriminatory rates charged African-Americans by referring to their rates as "standard" while concealing that Caucasian policyholders obtained "preferred" rates. R3-55-13-15¶¶38-42. Former agents of Liberty National stated under oath that the company internally referred to "standard" or "nigger" rates as "the blackbone of Liberty National." R2-46-2-4. Blackbone is not a typographical error.

2. Plaintiffs filed their class action complaint on December 8, 1999, for damages and equitable relief, alleging that Liberty National violated 42 U.S.C. § 1981 by charging higher life insurance premiums and paying lower death benefits to African-Americans than to Caucasians. R1-1-19.

On April 7, 2000, the district court dismissed the complaint after ruling that plaintiffs' § 1981 claim was time-barred by Alabama's two-year statute of limitations. R2-42-4-11. On July 3, 2000, the district court granted plaintiffs' motion to alter or amend the April 7 order, and

also granted plaintiffs leave to file an amended complaint. R2-53-16; R2-54-1. *Moore v. Liberty Nat'l Ins. Co.*, 108 F. Supp. 2d 1266 (N.D. Ala. 2000), aff'd, 267 F.3d 1209 (11th Cir. 2001).

The court ruled that plaintiffs' amended complaint, pleading claims under §§ 1981 and 1982, alleged with particularity that Liberty National engaged in fraudulent concealment that delayed the discovery and thus tolled the accrual of plaintiffs' claims. R3-53-8-10. At the hearing in the district court, Liberty National acknowledged that "accrual is judged as a matter of federal law even though [the federal courts] borrow state statute of limitations." R7-65-18:24.

The district court further ruled that Alabama's 20-year repose rule was not applicable to bar plaintiffs' federal civil rights claim (R2-53-12), but granted Liberty National's motion pursuant to 28 U.S.C. § 1292(b) to certify an interlocutory appeal of the following question:

> Whether Alabama's 20-year common law rule of repose bars the Plaintiffs in this action from pursuing federal claims under 42 U.S.C. §§ 1981 & 1982.

R3-60-2. The Eleventh Circuit accepted the appeal, but then affirmed.

3. The Eleventh Circuit held that a federal court in Alabama must apply the state two-year residual personal injury statute of limitations in civil rights actions, but does not borrow the Alabama common law rule of repose. (App. 13a) The Court of Appeals explained that under *Felder v. Casey*, 487 U.S. 131, 140 (1988), a rule of

repose was neither "universally familiar" nor "indispensable" to the federal statutory scheme. The court pointed out that "Liberty National has not directed us to a single case in which a blanket state rule of repose was applied by a federal court to bar a federal civil rights claim, and we are aware of none." (App. 10a)

The Eleventh Circuit also rejected Liberty National's contention that the Alabama rule of repose is "integral" to or "inseparable" from the Alabama statute of limitations. The Eleventh Circuit reviewed state law and found that the Alabama rule of repose was an independent substantive law doctrine that "is not affected by," "nor dependent upon," the statute of limitations. (App. 17a)

II. REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for three discrete reasons.

A. Certiorari Is Unwarranted Because the Conflict Alleged by Petitioner Between the Eleventh Circuit's Decision and the Alabama Supreme Court Does Not Exist

Petitioner claims that its petition should be granted because the Eleventh Circuit decision creates a "direct split" of authority with the Alabama Supreme Court's decision in *Ex parte Grubbs*, 542 So. 2d 927 (Ala. 1989). Petitioner describes *Grubbs* as a case involving a claim under 42 U.S.C. § 1983. (Pet. 8)

In fact, the opinion in *Grubbs* describes the case as a state law action for a writ of mandamus, ***not*** a federal

civil rights claim under § 1983. Petitioner Grubbs, a lawyer admitted to practice in Michigan in 1954, filed the mandamus action in 1985 seeking admission to the Alabama State Bar. He alleged that he had been denied admission to law school in Alabama in 1949 on racial grounds violating the Equal Protection Clause.

In *Grubbs*, the defendant State Bar contended that the Alabama two-year statute of limitations barred mandamus relief. The Bar proposed the two-year limitations period by analogy to this Court's application of the statute to a § 1983 action. *Owens v. Okure*, 488 U.S. 235 (1989). The Alabama Supreme Court declined, however, to hold that Grubbs' action was time-barred by the two-year limitation statute. *Grubbs*, 542 So. 2d at 931.[1]

Instead, the Alabama Supreme Court ruled that Grubbs' mandamus action was barred by the state's common law rule of laches and the state's common law 20-year rule of repose. With respect to the rule of repose, the Alabama court reasoned that this Court had recognized in 1950 that no person could be deprived of equal access to law school based on race or color. From that premise, the Alabama court held that Grubbs was barred by the 20-year rule of repose for failure to sue until 1985, some 36 years after he "knew of the discrimination." *Grubbs*,

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[1] Petitioner's citation to *Ex parte Liberty Nat'l Life Ins. Co.*, 2002 WL 64651 (Ala. Jan. 18, 2002), is premature. That case is captioned "Not Yet Released For Publication." Moreover, that case also involved purely state law claims. The decision does refer to *Grubbs* in a parenthetical as a § 1983 case, but that appears to be incorrect given that *Grubbs* describes itself as a state law mandamus action.

542 So. 2d at 930-31. The court stated that repose barred claims when plaintiffs have "slept upon their rights" after they had notice of their injury. *Id.*

In this case, plaintiffs have not "slept on their rights," but under Alabama's absolute rule of repose their suit would be barred. Thus, the rule operates arbitrarily to impair the rights of plaintiffs who had no idea that Liberty National was charging and collecting excessive race-based premiums because the company actively concealed its discriminatory scheme. No facts were known that would even trigger an inquiry. As this Court has explained, despite the "strong policies of repose" underlying a statute of limitation, an exception is recognized when defendants "by tactics of evasion, prevent the plaintiff from litigating the merits of a claim, even though on its face the claim is time-barred." *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980). Applying a rule of repose would reward Liberty's "tactics of evasion."

Moreover, though state courts have concurrent jurisdiction, federal civil rights laws create a "uniquely federal remedy" that is intended to be given broad sweep enforceable primarily in federal court, not state court. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972). In fact, the improper use of state courts as instruments for violating federal civil rights was one of the main concerns of Congress: "Proponents of the legislation noted that state courts were being used to harass and injure individuals." *Id.* at 240. Ironically, the Alabama rule of repose had its origin in a case protecting property rights in runaway slaves. *McArthur v. Carrie's Adm'r.*, 32 Ala. 75 (1858). Such a rule has no place as a limitations provision for federal civil rights claims.

Petitioners also contrive circuit conflicts on statute of limitations-related issues, namely, continuing violation and equitable estoppel, that were not addressed by the Eleventh Circuit decision. Even if the Eleventh Circuit had passed on these contentions, petitioner does not explain how such limitations issues bear on the question presented – whether Alabama's acknowledged "unusual, arcane" rule of repose bars a civil rights claim. (Pet. 13)

B. Certiorari Is Unwarranted Because the Eleventh Circuit Correctly Applied This Court's Decisions in *Felder v. Casey* and *Wilson v. Garcia*

Petitioner alternatively contends, albeit somewhat uncertainly, that the Eleventh Circuit's decision "seems inconsistent" with this Court's prior decisions. (Pet. 12) In fact, the Eleventh Circuit expressly and correctly applied *Wilson v. Garcia*, 471 U.S. 261, 267-71 (1985), and *Felder*, 487 U.S. at 137-41, to uphold application of the Alabama statute of limitations.

Petitioner claims the Eleventh Circuit misread *Felder*, but cites as support the dissent in *Felder*, not the seven justice majority. In fact, the Eleventh Circuit correctly held, applying *Felder*, that Alabama's common law rule of repose does not apply to federal civil rights actions. Alabama's rule of repose is neither "universally familiar" nor "indispensable" to fairly enforce federal civil rights law. *Felder*, 487 U.S. at 137-40, 152. Liberty National has not cited a single case where a rule of repose has been applied by a federal court in a federal civil rights action.

When a federal court borrows a state limitations period, it is closing the gap left by Congress. It must

"borrow no more than necessary" to fill that gap. *West v. Conrail*, 481 U.S. 35, 39-40 (1987). When a state has multiple tort limitations statutes, the federal courts borrow only from one source, the state's residual personal injury statute of limitations. *Owens*, 488 U.S. at 248-50. This Court's decision in *Hardin v. Straub*, 490 U.S. 536, 538-44 (1989), cited by petitioner, does not change the analysis. In *Hardin*, this Court held that the tolling provision of a state statute of limitations applies in a federal civil rights action. Respondents have never contended otherwise. Neither did the Eleventh Circuit. It acknowledged that the tolling rule applies, citing *Wilson* instead of *Hardin*. (App. 13a)

In sum, the Alabama two-year statute of limitations is sufficient to close the gap, and the district court correctly declined to borrow the independent substantive features of Alabama's rule of repose.

C. Certiorari Is Unwarranted Because, as the Eleventh Circuit Held, Application of Alabama's Rule of Repose Would Undermine the Federal Law of Accrual and the Remedial Policies Underlying Federal Civil Rights Laws

Although the length of the limitations period for civil rights claims is borrowed from state law, the question of when a claim accrues, as petitioner appropriately concedes, is distinctly federal. *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Cope v. Anderson*, 331 U.S. 461, 464 (1947). Under federal law, the claim accrues when it was discovered or reasonably should have been discovered. *Id.*

Applying the Alabama repose rule, however, would preclude all claims for discriminatory acts arising more than 20 years earlier, irrespective of when they were discovered. Thus, the common law of a state would override federal law on the distinctly federal question of when a federal civil rights claim accrues. Such a ruling would erase all federal civil rights claims in Alabama arising from acts over 20 years earlier no matter how fraudulently they were concealed or when they were discovered. But, this Court has held that a cause of action does not arise "until the fraud is discovered." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

Moreover, Alabama's rule of repose would cover not only §§ 1981 and 1982 in this case, but also §§ 1983 and 1985. It would cover not only claims of racially biased insurance sales, but also of constitutional transgressions by police officers and other government officials, employment discrimination, racially targeted violence, and a raft of other civil rights violations. The blanket restriction of Alabama's rule of repose is inconsistent with this Court's command that a rights statute be accorded "a sweep as broad as its language." *Wilson*, 471 U.S. at 272 (citation omitted).

Further, every state has a residual statute of limitations that can be borrowed in a federal civil rights action. But, no state other than Alabama appears to have a broad substantive rule of repose that, if applicable in civil rights actions, would unfairly afford Alabama defendants a defense not available elsewhere. Moreover, that defense would have impact outside Alabama. The plaintiffs are a nationwide class that includes citizens of other states.

Finally, the absence of rules of repose outside of Alabama is distinct from the lack of "nationwide uniformity" this Court accepts with respect to statutes of limitations. *Tomanio*, 446 U.S. at 489. Every state has a statute of limitations and any lack of uniformity was mainly in the varying length of such statutes in different states, usually one to three years. The total absence of repose elsewhere is a far more significant disparity precluding application of Alabama's eccentric rule.

III. CONCLUSION

The petition for writ of certiorari should be denied.

DATED: March 25, 2002

Respectfully submitted.

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